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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

KIMBERLY DAWN DOYLE, Plaintiff and Respondent, v. JUSTIN JAMES VAN SICKLE, Defendant and Appellant.	E049427 (Super.Ct.No. HEV006551) OPINION

APPEAL from the Superior Court of Riverside County. Angel M. Bermudez, Judge. Affirmed.

Stone Busailah, Michael P. Stone, Muna Busailah, Michael Williamson and Melanie C. Smith for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant Justin Van Sickle appeals after the trial court entered a domestic violence restraining order against him. He contends there was no evidence to support the order, because the alleged victim, plaintiff and respondent Kimberly D. Doyle, had no memory or recollection of the events in which she sustained her injuries.

Van Sickle also complains of time restrictions on the proceedings, the court's disregard of his alternate factual scenarios, the lack of corroboration of Doyle's testimony of past incidents of domestic violence, and that the court should have used a different standard for the burden of proof. We affirm the order.

FACTS AND PROCEDURAL HISTORY

Van Sickle and Doyle were involved in a romantic relationship from about August 2008. They shared a residence from about February 2009.[1] On the evening of July 19, 2009, they had gone out to several establishments and had some drinks. According to Van Sickle, Doyle had consumed several drinks. At one establishment, Doyle spent her time dancing with other men and kissing them. Doyle was so drunk that she fell. Van Sickle had to assist Doyle in walking to his car, and she was unable to get into the car without assistance.

Van Sickle drove home. By then it was the early morning hours of July 20, 2009. When they arrived home, Doyle got out of the car, but had difficulty standing and walking. She had to use the car for support in getting out and walking to the house.

At one point, Van Sickle and Doyle were walking up the stairs together inside the house. Doyle grabbed Van Sickle by the back of his trousers, and they both fell. According to Van Sickle, Doyle was upset with him because he had been talking to another woman at the club, or because Van Sickle wanted to go to a strip club. He was angry with Doyle and asked her to leave the house; Van Sickle told Doyle that their

[1] Van Sickle testified that Doyle might have moved into the home in April 2009, but conceded that it might have been in February.

relationship was over. He went upstairs, grabbed some of Doyle's clothing, and threw them in the back of Doyle's car. Doyle did not leave right away, but finally did so after 10 to 15 minutes. Van Sickle testified that he then locked the house door, and did not see what Doyle did or where she went. He stated that she was uninjured when she left.

Doyle testified that she and Van Sickle had gone out in the evening for some drinks, but after they left one of the bars she had an alcoholic blackout and remembered nothing further. The next morning, she woke up in the passenger seat of her car, which was parked on the driveway in front of the house. At that time, Doyle did not realize that she had been injured. She saw that some of her clothes had been thrown into the back seat. She went to the front door and knocked. Van Sickle answered the door; he told Doyle that the relationship was over because she had been "making out" with another man. Doyle went upstairs to collect her things, and that is when she saw herself and realized she was injured.

Doyle also saw signs of disturbance inside the house. A box of envelopes was thrown around the house. Some decorative beads and the straps had been torn from her dress and were strewn about. The remote control for her car was smashed. Her key chain was broken and bits of that were scattered. Clumps of Doyle's hair had been ripped out and were found throughout the house and in her car. Doyle was left with a bald patch on her head.

Doyle presented several photographs of her injuries, taken within a few days after the incident. Her moving papers included her declaration and medical reports, which

indicated she had suffered a swollen left eye, bruised right eye, swelling and blackening to her face, back pain, hair ripped out, and a broken nose.

Doyle also averred in her declaration and testified about three earlier incidents of domestic violence. Sometime in April 2009, Van Sickle allegedly pushed her with all his force, knocking Doyle onto her bottom. She was sore for weeks. Two other times, in late May or early June 2009, and again in mid-June 2009, while they were in Van Sickle's car, he became angry, pulled Doyle's hair and slammed her head against the car window. On each occasion, he pulled some hair from Doyle's head. To her petition, Doyle appended a declaration from her hairdresser to the effect that she had seen bald spots on Doyle's head from one of the earlier incidents.

Doyle testified that she did not report any of the three earlier incidents to police. The first time, she simply forgave Van Sickle. In the later incidents, Doyle felt that she had no way out, in part because Van Sickle would hide her phone so she could not call police, or would remove the batteries from the house phone. Doyle hoped things would get better.

Van Sickle testified that Doyle was the instigator of whatever altercation took place inside the house. He stated that she threw the envelopes around the house, she threw her keys and her car remote control at him, and she was the one who tore her dress.

On July 20, 2009, Doyle did call police for help, and obtained an emergency restraining order against Van Sickle. She also filed a petition for domestic violence restraining orders. Van Sickle answered the petition for the restraining orders, contending that he had never battered Doyle. He averred that Doyle was an alcoholic

who suffered blackouts, and stated that Doyle did not remember what happened on the evening of July 19-20, 2009. Van Sickle also expressed concern because he was employed as a deputy sheriff; the restraining orders required him not to possess any firearms, which jeopardized his employment. He averred that Doyle was frequently drunk, stumbling and falling; on the night in question, Doyle left smeared marks of makeup on Van Sickle's car, where she stumbled and fell against it. Van Sickle claimed that Doyle threw the envelopes at him. He put her clothes into her car and told her to leave. He locked the door and went to bed. He never assaulted Doyle, either on July 19-20, or any other time.

The trial court heard the evidence and the closing arguments. Van Sickle's counsel urged that Doyle's testimony was unreliable. She had no recollection of the relevant events. Counsel suggested that Doyle did not "know whether [her car] was locked or unlocked, and we don't know whether or not anyone else may have come there and assaulted her while she was in the car, and in fact, we don't know whether she invited one or more men she was dancing with and kissing on at the last bar they were at . . . and could have come . . . and committed an assault in the absence of [Van Sickle]." In addition, Doyle did not report any of the earlier incidents to police. She also moved back with her parents, so she had the ability to remove herself from the situation had she really been assaulted earlier.

The court found that the parties had the requisite dating and cohabiting relationship. The evidence provided a motive for Van Sickle to assault Doyle: jealousy over her behavior with other men on the evening in question. The court disregarded the

hypothesis that a third party may have committed the assault, because the clumps of hair torn from Doyle's head were both inside and outside the house. The other debris indicated that the scuffle took place inside the house. Van Sickle's photographs of his car did show indications that Doyle had been leaning or falling onto the car, but it did not negate the evidence of domestic violence. The court credited Doyle's testimony of earlier incidents of assault, and stated, "[t]here's also evidence the restrained party exercised attempts to control by eliminating evidence, such as providing cloths for her to wash out some injuries as well as negating her ability to call for help . . . ." Accordingly, the court granted the petition and imposed the restraining orders on Van Sickle.

Van Sickle filed a timely appeal.

ANALYSIS

I. Standard of Review

The abuse of discretion standard of review applies to a grant or denial of a protective order under the Domestic Violence Prevention Act (DVPA). (*In re Marriage of Nadkarni* (2009) 173 Cal.App.4th 1483, 1495.)

Van Sickle acknowledges that a trial court granting a protective order under the DVPA must make its findings by a preponderance of the evidence (*Gdowski v. Gdowski* (2009) 175 Cal.App.4th 128, 137), but urges that, when the person to be restrained is a sworn law enforcement officer, law and public policy require that the court use a different burden of proof (clear and convincing evidence) because of the effect on the restrained person's employment. This question, he argues, is one of law, which may be raised for the first time on appeal, and which an appellate court decides independently.

II. The Trial Court Did Not Abuse Its Discretion in Granting the Restraining Order

Van Sickle contends that the trial court abused its discretion in imposing the restraining order. He contends (1) the evidence was insufficient because Doyle's testimony was unreliable, in that she had no memory of how she became injured, (2) the order is not supported by substantial evidence because the trial court "disregarded the alternate scenarios suggested by Van Sickle's testimony," (3) the order is not supported by substantial evidence, because Doyle offered nothing to corroborate her claims that Van Sickle had engaged in past acts of domestic violence, and (4) the court abused its discretion in imposing an unreasonable time limit on the hearing.

Van Sickle's contentions are unpersuasive.

First, although Doyle suffered from alcoholic blackouts and could not remember most of the events of the evening, there was no showing that her testimony was unreliable as to any matters she did perceive or remember. She testified that she and Van Sickle had gone to various clubs or bars and had drinks. Van Sickle's testimony was the same. Doyle remembered nothing else until she woke up in her car. She saw her clothes tossed in the back of her car; Van Sickle testified that he had placed them there. The car obviously had to have been unlocked when he did so. Doyle said she knocked on the door and Van Sickle let her in the next morning. She saw various items strewn around the house, such as envelopes, a broken remote control, broken keychain, beads from her dress, etc. Van Sickle's testimony was wholly consistent with Doyle's observations about the condition of the house. The point of difference was Van Sickle's testimony that Doyle had thrown the envelopes at him, as well as her remote control and her keys. He

claimed she tore her own dress. Doyle did not remember any of these events. She admitted that she had thrown a book at Van Sickle in the past, but denied that she had ever torn her own clothing, and stated that "It would be impossible. I wouldn't even have the strength to rip up my own dress."

When Doyle went upstairs and saw herself for the first time, she realized she had been injured. Her nose was broken, her face was bruised, one eye was swollen shut, and her hair was ripped out, leaving a bald spot. Her photographs and medical records corroborated these conditions. The court itself observed some of the residual effects of Doyle's injuries at the time of trial, including redness from a burst blood vessel in one eye, and the remaining bald spot on Doyle's head. Envelopes, broken pieces of a keychain and the car remote control, and bits torn from Doyle's dress were not the only items scattered about the house. Doyle also testified that she saw clumps of her hair both in the house and in her car. Van Sickle's testimony did not contradict Doyle on that point. Although Van Sickle presented evidence of makeup smears on his car, when Doyle assertedly fell or staggered against it, that evidence did not explain the severity of Doyle's injuries or the torn clumps of hair inside the house.

Doyle's lack of memory of exactly how she suffered her injuries did not render her other observations unreliable, and her evidence supported the conclusion that she received the injuries inside the house during a struggle with Van Sickle.

Second, Van Sickle's complaint that the trial court disregarded his "alternate scenarios" is not well taken. Van Sickle testified that Doyle had attacked him inside the house. She had thrown envelopes and her keys at him. She grabbed him as he went up

the stairs, causing both to fall. He put her clothes inside her car, told her to leave, and locked the door against her when she did leave. He claimed she was uninjured when she left. He then stated, "I don't know what she did after that point. . . . For all I know she could have gone back to a bar. She could have walked around the block and fallen. I have no idea what she did after that point." Van Sickle had also testified that Doyle danced with and kissed two other men at one of the bars they visited. Defense counsel asked Doyle whether she had given her address or telephone number to any of the men she danced with, and she said that she did not remember doing so. Van Sickle presented no evidence to show that any such exchange had taken place. Counsel also asked whether, after Doyle had passed out in her car, she knew whether anyone other than Van Sickle had assaulted her, or whether any person she had met in the bar that evening had come to her home. Again, Doyle stated she had no knowledge that any such thing had occurred, and Van Sickle presented no evidence that any such thing had taken place. Nevertheless, in closing argument, defense counsel urged that, "we don't know whether she invited one or more men she was dancing with and kissing on at the last bar they were at based on the testimony of my client actually had the address[,] telephone number or contact information for the petitioner and could have come there and committed an assault in the absence of my client."

Imagining alternate "scenarios" is mere speculation; speculation is not evidence. (*People v. Waidla* (2000) 22 Cal.4th 690, 735.) The evidence showed that Doyle was so intoxicated that she was barely able to walk, and that she fell more than once. Even after these falls, however, according to Van Sickle, Doyle had sustained no injuries such as

those observed when she awoke. The "suggested scenario" that some hypothetical third person must have assaulted Doyle and inflicted the injuries after she lay passed out in her car was purely imaginary, and utterly failed to account for or explain the torn clumps of hair inside the house. The trial court properly disregarded the "suggested scenarios," which were not supported by any evidence.

Third, the trial court properly considered Doyle's evidence of past assaults. Although Van Sickle argues that Doyle's assertions were not corroborated, Doyle did present a declaration of her hairdresser, to the effect that, on June 4, 2009 (i.e., the month before the incident of July 19-20), she had observed a large bald spot on Doyle's head, consistent with Doyle's testimony that Van Sickle had pulled out her hair in one of the earlier assaults. Van Sickle complains that, "[a]ccording to Doyle's own testimony, she never took any action in response to the alleged abuse until she filed a request for a TRO on July 23, 2009." From this, he suggests that it is "unlikely that [the hairdresser's] declaration was actually written and signed on July 6, in anticipation of some future action. Either the date was a mistake, which does not make sense considering the request for [restraining orders] was filed in late July, or the affidavit was backdated, which would cast doubt on the credibility of the declarant as well as Doyle."

Van Sickle's contention consists, again, of mere speculation. Van Sickle gives no citation to any testimony by Doyle, to the effect that she "never took any action in response to the alleged abuse until she filed a request for a TRO on July 23, 2009." We have examined the record and find no such testimony. Doyle did testify that she made no report to the police concerning either the first incident of prior abuse, in April 2009, or

the second, which took place at the end of May or beginning of June. However, there is nothing inconsistent between that testimony and the procuring of a declaration from her hairdresser in July 2009, about the hairdresser's observations of clumps of hair missing on June 4, 2009, well before the incident of July 19 and 20. Van Sickle casts aspersions on the dating of the hairdresser's declaration, but there is nothing whatever to support the view that the declaration was written and executed at any time other than the stated date.

Doyle testified she did not call police at the time of some of the incidents, because Van Sickle had hidden her cell phone and had taken the batteries out of the house phone. After a day or so, Doyle testified, she had forgiven Van Sickle and hoped things would be better.

Van Sickle appears to argue that Doyle is not credible because she did not pursue charges, even though "at some point, Doyle must have regained the use of her phone," and because she had enough personal freedom to run errands such as visiting the hairdresser. Van Sickle also points out that Doyle had since moved back into her parents' home, suggesting that "Doyle had an alternative living arrangement available, and a source of help, if she needed it." Van Sickle argues that these circumstances tend to undermine Doyle's credibility on the question whether "those prior incidents ever happened at all."

Van Sickle's argument is based upon hypothesis and conjecture, and is dependent on construing the facts most favorably to himself. This turns the standard of review on its head. On review, we presume the correctness of the lower court's order. (*Boyle v. CertainTeed Corp.* (2006) 137 Cal.App.4th 645, 649-650 [an appealed judgment is

presumed correct, and the appellant bears the burden of overcoming the presumption of correctness].) Van Sickle bears the affirmative burden to demonstrate that the trial court abused its discretion. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566 [the burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown, and unless there has been a miscarriage of justice, a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power].) Van Sickle's speculation and request to reweigh the evidence is insufficient to affirmatively demonstrate an abuse of discretion.

Fourth, Van Sickle's argument that the trial court erred in imposing time limits on the proceedings is also without merit. At the outset, the court asked defense counsel for an estimate of time; Van Sickle's counsel estimated that the proceedings would take between 30 and 45 minutes. When it called the matter for hearing, the court stated, "I'll give you 40 minutes to do your hearing. Each side will be allocated 20 minutes to present their case. You won't take up more than that time. If you don't use your time wisely, that's your problem, not mine." After Doyle had concluded her testimony and documentary evidence, Van Sickle had approximately eight minutes remaining, and Doyle had about seven more minutes to devote to the defense case.

Van Sickle testified under direct examination, and was subject to some cross-examination by Doyle. Defense counsel appeared to ask all the questions he desired on direct examination. Counsel also invited Van Sickle on redirect examination to inform the court of any other matters Van Sickle desired before the court ruled on the petition.

Van Sickle argues here that "[t]he record does not contain an express indication of what testimony [he] might have gone into if allowed more than eight minutes on the stand, but he should have been given an adequate amount of time to tell his side of the story." For example, he indicates that he did not testify about the allegations of prior assaults, "because he used up his time testifying about the night of July 19th."

The record does not support the conclusion that Van Sickle was prevented from raising any matters in opposition to the allegations of prior abuse. Doyle's petition fully disclosed the allegations. Van Sickle's responding papers alleged that he had never assaulted Doyle, either on the night of July 19-20, 2009, "nor anytime before." Defense counsel concluded the direct examination of Van Sickle, and then went over Van Sickle's photographs of his vehicle, showing the various smears of makeup, at some length. At that point, counsel acknowledged that he was "well out of time," but moved the photographs into evidence. There was then some cross-examination by Doyle, as well as inquiry by the court. Then, Van Sickle's counsel opened redirect examination, inviting Van Sickle to place anything else he wished in front of the court. Van Sickle did not take advantage of this opportunity to say anything further about the alleged prior assaults. Even in his brief on appeal, Van Sickle offers nothing by way of any suggestion as to additional evidence he could and would have offered, on that issue or any other, had the court not set the stated time limit. Van Sickle has failed to demonstrate any abuse of discretion in the time limits set for the hearing.

None of Van Sickle's complaints demonstrates that the court abused its discretion in imposing the restraining orders against him.

Van Sickle raises the final issue that the court should have employed a different standard of proof—clear and convincing evidence—rather than the preponderance of the evidence in making its determination under the DVPA. He points out that restraining orders under the Code of Civil Procedure require proof by clear and convincing evidence, whereas restraining orders under the DVPA or the Elder Abuse Act require proof only by a preponderance of the evidence. Because the order here affected Van Sickle's interest in pursuing his profession, he contends that the clear and convincing standard of proof should apply when the person restrained under the DVPA is a law enforcement officer.

Protective orders under, e.g., Code of Civil Procedure section 527.8, require proof of a threat of future harm. The restraining orders under the DVPA and the Elder Abuse Act apply to domestic situations, where the Code of Civil Procedure orders apply generally, e.g., to workplace harassment and so on. As the court explained in *Gdowski v. Gdkowski*, *supra*, 175 Cal.App.4th 128, "[b]oth Family Code section 6300 and Welfare and Institutions Code section 15657.03 require a showing of past abuse, not a threat of future harm. Family Code section 6300 has been interpreted to permit a trial court 'to issue a protective order under the DVPA simply on the basis of an affidavit showing past abuse.' [Citation.] The DVPA and the Elder Abuse Act therefore permit issuance of protective orders on a different, broader basis than permitted under Code of Civil Procedure sections 527.6 and 527.8. [Citation.] Additionally, a lower level of proof is required for issuance of a protective order under the DVPA and the Elder Abuse Act--a preponderance of the evidence, rather than clear and convincing evidence. [Citations.]" (*Id*. at p. 137.) The different basis for DVPA and Elder Abuse Act protective orders

justifies the use of a different standard of proof. We therefore reject Van Sickle's contention that the trial court erred in employing the preponderance of the evidence standard.

In any case, regardless of the standard of proof, the evidence is sufficient to support the imposition of the restraining orders. The evidence was consistent only with the thesis that Van Sickle was the person who tore chunks from Doyle's hair. The attack resulting in Doyle's injuries took place in the house; there was no evidence of any other explanation for her injuries.

DISPOSITION

The trial court's order is affirmed.

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/s/ McKINSTER
J.

We concur:

/s/ RAMIREZ
P. J.

/s/ HOLLENHORST
J.